2000

State of Utah v. Daniel B. Powell : Reply Brief

Utah Court of Appeals

Mark L. Shurtleff; Utah Attorney General; Karen A. Klucznik; Assistant Attorney General; Attorneys for Appellee.

Scott L Wiggins; Arnold & Wiggins; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, v. DANIEL B. POWELL, Defendant / Appellant.	)	Case No. 20000991-CA PRIORITY NO. 2

REPLY BRIEF OF APPELLANT

Appeal from Sentence, Judgment, and Commitment entered on October 19, 2000, in the Second District Court, Davis County, the Honorable Rodney S. Page, presiding.

SCOTT L WIGGINS (5820)
ARNOLD & WIGGINS, P.C.
American Plaza II, Suite 105
57 West 200 South
Salt Lake City, UT 84101
(801) 328-4333
(801) 328-2405 (facsimile)
Attorneys for Appellant

MARK L. SHURTLEFF (3340)
UTAH ATTORNEY GENERAL
KAREN A. KLUCZNIK (7912)
ASSISTANT ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Attorneys for Appellee

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(801) 328-4333
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MARK L. SHURTLEFF (3340)
UTAH ATTORNEY GENERAL
KAREN A. KLUCZNIK (7912)
ASSISTANT ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Attorneys for Appellee

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ARGUMENT

I. EVEN WITH THE STATE'S MISREPRESENTATIONS AND OMISSIONS, THE EVIDENCE, AS MARSHALED, IS INSUFFICIENT TO SUPPORT THE TRIAL COURT'S DETERMINATION THAT MR. POWELL *KNOWINGLY* AND *INTENTIONALLY* POSSESSED THE FIREARM.

The State argues that the evidence was sufficient to convict Mr. Powell for illegal possession of a firearm. *See* Brief of Appellee, pp. 8-13. In the course of its argument, the State, as demonstrated below, misrepresents and omits various critical facts.

The State argues that Mr. Powell had knowledge of the firearm's presence because his cigarette rolling papers were located in the same backpack as Ms. Shannon Stewart's firearm. By so arguing, the State implies that the firearm was in plain view and easily accessible. Contrary to the State's assertions, Ms. Stewart's firearm was neither in plain sight nor was it easily accessible (*See* R. 93, p. 12, lines 7-25). Rather, Ms. Stewart's firearm was located in a separate zippered, self-contained, black-colored fanny pack inside its own shoulder-strap holster, which, in turn, was located in the "dark colored back pack." (*See id.*).

The State, in its Brief, makes little effort to cite to *State v. Layman*, 1999 UT 79, 985 P.2d 911, which is the Utah Supreme Court's most recent pronouncement concerning the legal principles of constructive possession. In *Layman*, the defendant was

convicted of a drug possession charge on a theory of constructive possession. Like this case, the evidence presented against the defendant was circumstantial. Among other things, when the woman who actually possessed the drugs in *Layman* was asked by the officer if he could see the pouch, which he later found to contain the illegal substance, she looked at the defendant and he "shook his head in a negative fashion for an unspecified length of time." *Id.* at ¶8. Affirming this court's reversal of Layman's conviction, the Utah Supreme Court concluded that the evidence was legally insufficient to warrant drawing an inference of constructive possession. *Id.* at ¶16. The Court stated:

> We conclude that the court of appeals properly found the evidence in this case is insufficient. When all the brush is cleared, the critical fact is that there was little evidence to prove that Michael had such control over Gina's person that one could reasonably infer beyond a reasonable doubt that he knowingly and intentionally possessed the drugs and paraphernalia in her pouch. The only fact tending to prove Michael's control over Gina is that she looked at him when the deputy requested to see the pouch and that Michael shook his head in a negative fashion. *This simply is not enough.*

Id. (emphasis added).

The Court in *Layman* both reaffirmed and solidified the requirement that to prove constructive possession, "it is necessary that 'there [be] a sufficient nexus between the accused

and the [item allegedly possessed] to permit an inference that the accused had both the power and the intent to exercise dominion and control . . . .'" *Id.* at ¶13 (quoting *State v. Fox*, 709 P.2d 316, 319 (Utah 1985)); *see also United States v. Mills*, 29 F.3d 545, 549 (10th Cir. 1994) (citing *United States v. Sullivan*, 919 F.2d 1403, 1431 (10th Cir. 1990)).[1] Moreover, there must be facts that show the accused intended to use the allegedly possessed item, which in this case is the firearm, as his own. *See id.*[2] The State must prove the elements of constructive possession beyond a reasonable doubt. *See id.* at ¶¶12 and 16.

In the instant case, the State had to prove beyond a reasonable doubt that the firearm was subject to Mr. Powell's

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[1]In the course of discussing the type of nexus referred to in *State v. Layman*, 1999 UT 79, ¶13, 985 P.2d 911, the United States Court of Appeals for the District of Columbia stated that the State cannot rest its case on "the mere circumstance that a defendant was close to or had access to the illegal items;" rather "there must be ''some action, some word, or some conduct that links the individual to the [illegal items] and indicates that he had some stake in the them, some power over them.''" *United States v. Ford*, 993 F.2d 249, 252 (D.C. Cir. 1993) (quoting *United States v. Foster*, 783 F.2d 1087, 1089 (D.C. Cir. 1986) (quoting *United States v. Pardo*, 636 F.2d 535, 549 (D.C. Cir. 1980)).

[2]In *State v. Layman*, 1999 UT 79, 985 P.2d 911, the Court recognized that the determination concerning the existence of a sufficient nexus for constructive possession is a "highly fact-sensitive determination." *Id.* at ¶14. The Court also noted that while the different factors listed in previous cases might be of help in guiding the fact finder, "[t]hey are not universally pertinent factors, and they are not legal elements of constructive possession in any context." *See id.*

dominion and control, and that Mr. Powell had the intent to exercise that control. The record demonstrates that there was little, if any, evidence to prove that Mr. Powell knew of the firearm's location in the vehicle so that one could reasonably infer beyond a reasonable doubt that he knowingly and intentionally possessed the firearm located in Ms. Stewart's fanny pack, which, in turn, was located inside her back pack.

The only facts tending to prove Mr. Powell's control over the firearm are the proximity of the back pack and Mr. Powell's insistence that the firearm was not loaded when he was informed by Officer Anderson about the loaded firearm found in the vehicle. That simply is not enough to establish the requisite nexus between Mr. Powell and the firearm to permit a reasonable inference that Mr. Powell knowingly and intentionally possessed the firearm. *See Layman*, 1999 UT 79 at ¶15; *Fox*, 709 P.2d at 318.

All the other evidence in this case lends little or nothing to the critical factual issue. At the very least, the other evidence is inconclusive as to whether Mr. Powell knew or intended to possess the firearm and, in many instances, the other evidence supports the determination that he did not knowingly or intentionally possess the firearm. For example, while the vehicle was registered in Mr. Powell's name, both Mr. Powell and Ms. Stewart shared the vehicle (R. 93, p. 39, lines 4-10). In fact,

Ms. Stewart had used the vehicle earlier that day after which she inadvertently left her back pack in the vehicle (R. 93, p. 41).[3] Many of these facts are made all that more credible by the fact that Ms. Stewart, at the time of trial, was an adverse witness to Mr. Powell by virtue of the protective order she had sought against him prior to trial (*See* R. 93, p. 38).

The State argues that Mr. Powell exhibited incriminating conduct and made incriminating statements during the investigation of the vehicle. *See* Brief of Appellee, pp. 10-12. However, Mr. Powell's conduct, if anything, supports his lack of knowledge concerning the firearm. Although the officers allowed Mr. Powell to return to the vehicle to assist in moving it from the highway, Mr. Powell made absolutely no effort to remove or conceal the back pack, which contained the firearm (R. 93, p. 68). Instead, Mr. Powell allowed the back pack to remain next to him in the adjacent passenger seat (*See id.*). Furthermore, in the course of the investigation, Mr. Powell readily admitted to smoking marijuana a few days prior to the accident (R. 93, pp. 6-8). Additionally, when informed by Officer Anderson that he had found the firearm in the vehicle, Mr. Powell spontaneously denied ownership of the firearm and uttered that Ms. Stewart "had put the gun in the car."

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[3]Ms. Stewart incontrovertibly testified that she owned both the firearm and the back pack in which the firearm was contained (R. 93, pp. 39-41).

(*See* R. 93, pp. 15-16). *Cf. State v. Salas*, 820 P.2d 1386, 1389 (Utah Ct. App. 1991).

Viewing the evidence presented as a whole, no reasonable inference can be drawn that Mr. Powell knowingly and intentionally possessed the firearm. *See Layman*, 1999 UT 79 at ¶16; *see also State v. Hester*, 2000 UT App 159, ¶16, 3 P.3d 725. The firearm was neither in plain view nor was it easily accessible to Mr. Powell. Indeed, there was no circumstantial evidence that Mr. Powell even knew that the firearm was in the vehicle. Rather, the foregoing evidence demonstrates his ignorance that the firearm was located in the back pack let alone the vehicle.

"An appellate court should overturn a conviction for insufficient evidence when it is apparent that there is not sufficient competent evidence as to each element of the crime charged for the fact-finder to find, beyond a reasonable doubt, that the defendant committed the crime." Such is the case here.

II. THE TRIAL COURT NOT ONLY VIOLATED UTAH RULE OF CRIMINAL PROCEDURE 22(a) WHEN IT SENTENCED MR. POWELL, BUT IT VIOLATED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS.

The State argues that the trial court did not plainly error when it sentenced Mr. Powell because it heard from appointed trial counsel *and* the State, through appointed counsel. *See* Brief of Appellee, pp. 13-16. However, the affirmative obligation imposed

upon the trial court by Rule 22(a) and prior case law indicate otherwise.

In *State v. Wanosik*, 2001 UT App 241, 31 P.3d 615, *cert. granted*, 43 P.3d 951 (Utah 2002), the trial court proceeded and imposed sentence upon the defendant, who was *voluntarily* absent. *Id.* at ¶¶4-5. The defendant, Mr. Wanosik, appealed, arguing, among other things, that "the trial court erred by the manner in which it conducted sentencing." *Id.* at ¶7.

In its analysis of the sentencing procedure, this Court held that Utah Rule of Criminal 22(a)[4] "imposes an affirmative obligation on the trial court to extend the opportunity to be heard" and that Rule 22 "does not contemplate the court will passively wait for counsel to make a request to be heard." *Id.* at ¶32. This Court further stated, "The onus is thus on the trial court to 'afford' the defendant and to 'give' the prosecutor the opportunity to present relevant information." *Id.* (citation and

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[4]Rule 22(a) of the Utah Rules of Criminal Procedure states, in relevant part:

> Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

Utah R. Crim. P. 22(a).

footnote omitted); *see also State v. Howell*, 707 P.2d 115, 118 (Utah 1985) (holding that predecessor statute "directs trial courts to hear evidence from both the defendant and the prosecution that is relevant to the sentence to be imposed."). After concluding that the trial court's noncompliance with Rule 22(a) was not harmless, this Court vacated Mr. Wanosik's sentences and remanded for resentencing. *Wanosik*, 2001 UT App 241 at ¶33.

At sentencing in the instant case, the trial court knew that Mr. Powell was involuntarily absent (*See* R. 94, Tab 7, p. 1); *see also* R. 59-60, Consent to Sentencing in Absentia). After briefly discussing Mr. Powell's involuntary absence and the consent to sentencing in absentia, the trial court immediately proceeded to impose sentence (*See* R. 94, Tab 7, pp. 1-3). Contrary to the State's assertion, however, the trial court, prior to imposing sentence, failed to illicit from either defense counsel or the prosecutor "any information in mitigation of punishment" or "any [other] information material to the imposition of sentence." *See* Utah R. Crim. P. 22(a). Moreover, at no time during the sentencing hearing did the court reference the Presentence Investigation Report, which had been previously prepared for the

very purpose of sentencing (*See* R. 73-94, Presentence Investigation Report).[5]

By not providing the opportunity to present information material to sentencing, the trial court precluded the presentation of mitigating circumstances and thus alternative considerations for sentencing.[6] Rather, the trial court proceeded directly to sentencing without any other consideration.

The plain error analysis of the *Wanosik* case is premised upon the Utah Supreme Court's interpretation of the predecessor statute to Rule 22(a) in *State v. Howell*, 707 P.2d 115, 118 (Utah 1985). *See Wanosik*, 2001 UT App 241, ¶32 & n.12, 31 P.3d 615. Moreover, the *Wanosik* opinion is based, at least in large part, on the plain

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[5]The State argues that the trial court apparently referred to the PSI in the course of sentencing. *See* Brief of Appellee, p. 16. Moreover, the State argues that the PSI is not part of the record on appeal. The State failed to recognize that the PSI is part of the record and is currently before this Court in *State v. Powell*, Case No. 20001054-CA, as explicitly set forth in footnote 5 of the Brief of Appellant. The trial court sentenced Mr. Powell *in absentia* on both cases at the same sentencing hearing on October 17, 2000. *See* R. 94, Tab 7). Because of the trial court's obvious confusion during sentencing concerning the charges upon which the sentence was based, the trial court had to "redo" the sentence, at which time the trial court failed to make any reference to the PSI (*See* R. 94, Tab 7, pp. 2-3).

[6]The State mistakenly refers to the request for sentencing by defense counsel as a joint recommendation of defense counsel and the prosecution. *See* Brief of Appellee, p. 15. In fact, the record clearly indicates that the request for sentencing was made only by Mr. Powell's appointed trial counsel (*See* R. 94, Tab 7, p, 1, lines 19-22).

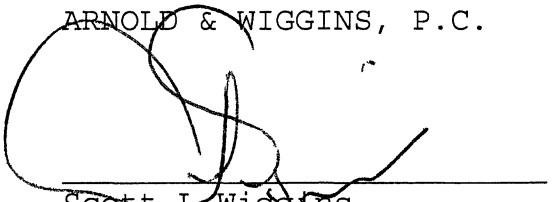
language of Rule 22(a), which places "an affirmative obligation" upon the trial court. Finally, the *Wanosik* holding is more applicable to the instant case inasmuch as Mr. Powell, unlike the defendant in *Wanosik*, was *involuntarily* absent from sentencing.

CONCLUSION

Based on the foregoing, as well as that forth in the previously submitted Brief,[7] Daniel B. Powell, respectfully requests that this Court reverse his conviction of illegal possession of a handgun and vacate the invalid sentence and remand the case to the trial court for resentencing and for such other relief as the Court deems just and appropriate.

RESPECTFULLY SUBMITTED this 17th day of July, 2002.

ARNOLD & WIGGINS, P.C.



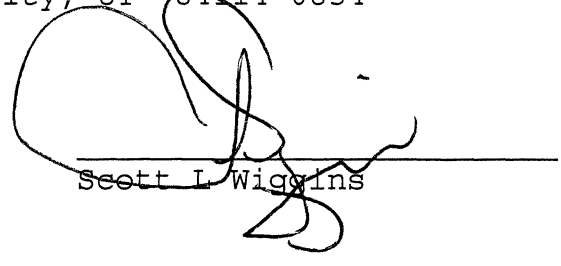
Scott L Wiggins
Attorneys for Appellant

[7]Mr. Powell incorporates the arguments set forth in the Brief of Appellant on the trial court's violation of his constitutional right to due process in the course of sentencing.

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First-Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following on this 17th day of July, 2002:

Ms. Karen A. Klucznik
Assistant Attorney General
Criminal Appeals Division
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854



Scott L Wiggins

ADDENDUM

No Addendum is necessary pursuant to Utah Rule of Appellate Procedure 24(a)(11).